

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BECKLEY DIVISION**

MICHAEL D. ROSE and)
EDWARD L. HARMON, on their own)
behalf and on behalf of all others)
similarly situated,)

Plaintiffs,

V.

**Civil Action No. 5:22-cv-00405
(Judge Volk)**

JEFF S. SANDY, et al.

Defendants.

**PLAINTIFFS' EXPEDITED MOTION TO COMPEL APPEARANCE AND
TESTIMONY OF GOVERNOR JAMES C. JUSTICE AND BRIAN ABRAHAM AT
DEPOSITIONS AND TO PRODUCE DOCUMENTS**

COME NOW Plaintiffs by and through undersigned counsel, and hereby move this Court for an order requiring James C. Justice and Brian Abraham to appear and give testimony at their scheduled depositions and to produce certain documents on October 24, 2023. In support of their Motion, Plaintiffs hereby state as follows:

On September 15, 2023, Plaintiffs filed their Amended Notice of Videotaped Deposition Duces Tecum of James C. Justice III [ECF 629] and Amended Notice of Videotaped Deposition Duces Tecum of Brian Abraham [ECF 630]. Counsel for Mr. Justice and Mr. Abraham agreed to accept service of the subpoenas via email. Plaintiffs' counsel emailed the subpoenas, along with the Amended Notices on September 15, 2023. See Exhibit 1.

On October 6, 2023, Plaintiffs' counsel emailed counsel for Mr. Justice and Mr. Abraham to establish a definitive time to meet and confer and finalize the location for the depositions set for

October 24, 2023. During this phone call, Plaintiffs were made aware that Mr. Justice and Mr. Abraham were going to move to quash the subpoenas issued to them. *Federal Rule of Civil Procedure* 45(d)(3)(A) states,

On *timely* motion, the court for the district where compliance is required must quash or modify a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden.

Neither Mr. Justice nor Mr. Abraham meet the requirements to quash the subpoenas and have not filed any motion to state otherwise. Moreover, moving to quash the subpoenas a week prior to the scheduled depositions would be untimely, especially given that the depositions were noticed over a month ago. Counsel for deponents are causing delay and burden on the Plaintiffs knowing that discovery in this case closes on November 17, 2023, and these depositions cannot be pushed out to any later date. Both deponents have been identified by the Defendants in this case as having knowledge relevant to the issues alleged by the Plaintiffs. Specifically, Defendants such as Jeff Sandy, testified that for years his department requested of the Governor's office funding to address pervasive overcrowding, pervasive understaffing, and over two hundred million dollars in deferred maintenance. See, *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970 (1994). See also, Transcript, relevant portions as Exhibit 2.

Further, the Amended Notices require that the deponents or their counsel produce documents pursuant to the deposition duces tecum at least five days prior to the depositions. This would make documents due on Thursday, October 19, 2023. Under *Federal Rule of Civil Procedure* 45(d)(2)(B),

A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or

to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served.

Neither Mr. Justice nor Mr. Abraham have served a written objection to the production of documents described in the Amended Notice of Deposition Duces Tecum. The fourteen-day window from service of the subpoena has passed and Plaintiffs have received no written objections. Therefore, Mr. Justice and Mr. Abraham should be compelled to produce documents prior to their depositions.

WHEREFORE, an order compelling Mr. Justice and Mr. Abraham to appear and testify at their depositions is appropriate and just. Deponents have not moved to quash the subpoenas as of the date of this filing, despite their counsel making Plaintiffs aware of their intent to do so. Moving to quash the subpoenas a week out from the depositions would be untimely and extremely prejudicial to the Plaintiffs in this action. Plaintiffs request that the Court order the appearance of Mr. Justice and Mr. Abraham at their depositions and documents responsive to the Notice be produced at least five days prior thereto.

MICHAEL D. ROSE, on his own behalf and
on behalf of all those similarly situated,

By Counsel,

/s/ Stephen P. New

Stephen P. New (WVSB No. 7756)
Emilee B. Wooldridge (WVSB No. 14310)
Stephen New & Associates
430 Harper Park Drive
Beckley, West Virginia 25801
Ph: (304) 250-6017
Fax: (304) 250-6012
steve@newlawoffice.com

Amanda J. Taylor (WVSB No. 11635)
Taylor, Hinkle & Taylor, Inc.
115 ½ South Kanawha Street
Beckley, WV 25801
O: (304) 894-8733
F: (681) 245-6236

Timothy Lupardus (WVSB No. 6252)
The Lupardus Law Office
275 Bearhole Road
Pineville, West Virginia 24874
(304) 732-0250
office@luparduslaw.com

Zachary Whitten (WVSB No. 13709)
The Whitten Law Office
P.O. Box 753
Pineville, West Virginia 24874
zwhittenlaw@gmail.com

Robert Dunlap (WVSB No. 10012)
Robert Dunlap & Associates
208 Main Street
Beckley, West Virginia 25801
(304) 255-4762
robertdunlapesq@gmail.com

